Supreme Court, U.S.
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No. ____

In The

Supreme Court of the United States

October Term, 1997

STANLEY L. PETERS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the District Court erred in denying Stanley L. Peters' Motion For Summary Judgment for the reason that the United States has attempted to punish him twice for the same offense by convicting him criminally of filing false claims with the Environmental Protection Agency and then pursuing a civil judgment against Peters under the False Claims Act in a separate proceeding for $234,909.79 over and above the Government's proven loss.

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Stanley L. Peters, respectfully prays that writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit, entered in the above entitled proceeding on April 8, 1997, affirming the District Court's decision to grant the United States' motion for summary judgment and deny Peters' motion for summary judgment.

OPINIONS BELOW

The opinion of the Court of Appeals for the Eighth Circuit that gave rise to this petition is *United States v. Stanley L. Peters*, 110 F.3d 616 (8th Cir. 1997), and appears as Appendix A to this Petition. The unpublished memorandum opinion of the District Court affirmed by the Court of Appeals appears in Appendix B. The judgment of the District Court pursuant to its memorandum and order appears in Appendix C.

JURISDICTION

On June 3, 1996, the United States District Court for the District of Nebraska issued a memorandum decision granting the United States' motion for summary judgment and denying Peters' motion for summary judgment. On June 28, 1996, Peters filed a timely notice of appeal to the United States Court of Appeals for the Eighth Circuit. On April 8, 1997, the Court of Appeals opinion in this matter was filed.

The jurisdiction of the court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED IN THIS CASE

The Fifth Amendment to the United States Constitution provides:

> No person shall be held to answer for a capital, or other infamous crime, unless on a presentment or indictment of a grand jury, excepting cases arising in the land or navel forces, or in the militia, when an actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

28 U.S.C. § 1345, provides:

> Except as otherwise provided by act of congress, the district court shall have original jurisdiction of all civil actions, suits or proceedings commenced by the United States, or by any agency or officer thereof expressly authorized to sue by act of congress.

31 U.S.C. § 3729, provides:

> (a) Liability for certain acts. Any person who –
>
> (1) Knowingly presents, or causes to be presented, to an officer or employee of the

United States Government or a member of the Armed Forces of the United States a false or fraudulent claim for payment or approval;

(2) Knowingly makes, uses, or causes to be made or used, a false record or statement to get a false or fraudulent claim paid or approved by the Government;

(3) Conspires to defraud the Government by getting a false or fraudulent claim allowed or paid;

(4) Has possession, custody, or control of property or money used, or to be used, by the Government and, intending to defraud the Government or willfully to conceal the property, delivers, or causes to be delivered, less property than the amount for which the person receives a certificate or receipt;

(5) Authorize to make or deliver a document certifying receipt of property used, or to be used, by the Government and, intending to defraud the Government, makes or delivers the receipt without completely knowing that the information on the receipt is true;

(6) Knowingly buys, or receives as a pledge of an obligation or debt, public property from an officer or employee of the Government, or a member of the Armed Forces, who lawfully may not sell or pledge the property; or

(7) Knowingly makes, uses, or causes to be made or used, a false record or statement to conceal, avoid, or decrease an obligation to pay or transmit money or property to the Government, is liable to the United States Government for civil penalty of not less than $5,000.00 and not more than $10,000.00, plus 3 times the

amount of damages which the Government sustains because of an act of that person, except that if the court finds that –

(A) The person committing the violation of this subsection furnished officials of the United States responsible for investigating false claims violations with all information known to such person about the violation within 30 days after the date on which the defendant first obtained the information;

(B) Such person fully cooperated with any Government investigation of such violation; and

(C) At the time such person furnished the United States with the information about the violation, no criminal prosecution, civil action, or administrative action had commenced under this title with respect to such violation, and the person did not have actual knowledge of the existence of an investigation into such violation;

the court may assess not less than 2 times the amount of damages which the Government sustains because of the act of the person. A person violating this subsection shall also be liable to the United States Government for the costs of a civil action brought to recover any such penalty or damages.

(b) Knowing and knowingly defined. For purposes of this section, the terms "knowing" and "knowingly" mean that a person, with respect to information –

(1) Has actual knowledge of the information;

(2) Acts in deliberate ignorance of the truth or falsity of the information; or

(3) Acts in reckless disregard of the truth or falsity of the information, and no proof of specific intent to defraud is required.

(c) Claim defined. The purpose of this section, "claim" includes any request or demand, whether under a contract or otherwise, for money or property which is made to a contractor, grantee, or other recipient if the United States Government provides any portion of the money or property which is requested or demanded, or if the Government will reimburse such contractor, grantee, or other recipient for any portion of the money or property which is requested or demanded.

(d) Exemption from disclosure. Any information furnished pursuant to subparagraphs (A) through (C) of subsection (a) shall be exempt from disclosure under section 552 of Title 5.

(e) Exclusion. This section does not apply to claims, records, or statements made under the Internal Revenue Code of 1954.

31 U.S.C. § 3731, provides:

(a) A subpoena requiring the attendance of a witness at a trial or hearing conducted under section 3730 of this title may be served at any place in the United States.

(b) A civil action under section 3730 may not be brought –

(1) More than 6 years after the date on which the violation of section 3729 is committed, or

(2) More than 3 years after the date when the facts material to the right of action or known or reasonably should have been known by the official of the United States charged with responsibility to act in the circumstances, but in no event more than 10 years after the date on which the violation is committed, whichever occurs last.

(c) In any action brought under section 3730, the United States shall be required to prove all essential elements of the cause of action, including damages, by a preponderance of the evidence.

(d) Notwithstanding any other provisions of law, the Federal Rules of Criminal Procedure, or the Federal Rules of Evidence, a final judgment rendered in favor of the United States in any criminal proceeding charging fraud or false statements, whether upon a verdict after trial or upon a plea of guilty or nolo contendere, shall estop the defendant from denying the essential elements of the offense in any action which involves the same transaction as in the criminal proceeding and which is brought under subsection (a) or (b) of section 3730.

STATEMENT OF THE CASE

The government brought this action against Peters pursuant to 28 U.S.C. § 1345 and the False Claims Act, 31 U.S.C. § 3729, *et seq.*, to recover civil monetary penalties

and damages under 31 U.S.C. § 3729. The Plaintiff in this action is the United States of America, acting on behalf of the Environmental Protection Agency ("EPA"). Both parties filed cross motions for summary judgment alleging there was no genuine issue of material fact in the case currently on appeal. The Government claimed that Peters was not allowed to relitigate that issue pursuant to 31 U.S.C. § 3731(d) because he was convicted by a jury for filing a false claim with the EPA and converting monies of the EPA for his use or for the use of another. Peters asserted in his motion for summary judgment that the United States was barred by the doctrine of *res judicata* and the double jeopardy provision of the Fifth Amendment to the United States Constitution from seeking a separate punishment against him from those imposed at the criminal trial for the same conduct.

There is no dispute that the government's present claims arise from the same conduct for which Peters was convicted. On June 3, 1996, the District Court granted Plaintiff's motion for summary judgment and denied Peters' motion for summary judgment. Also on that date, the Court entered judgment for the Plaintiff and against the Defendant for $480,428.00 pursuant to the Court's Memorandum and Order.

The District Court found ten (10) different undisputed material facts in its Memorandum and Order filed June 3, 1996. Those facts are set forth as follows:

1. Peters owned the architectural/engineering firm of Stanley L. Peters and Associates (SLPA). SLPA was in the business of assisting school districts in applying for federal grants for the removal of asbestos under

the Asbestos School Hazard Abatement Act (ASHAA), 20 U.S.C. §§ 4011, *et seq.*

2. SLPA assisted the Fairbury Public Schools (FPS) in applying to the United States Equal Protection Agency for financial assistance under the ASHAA, and on April 28, 1989 the EPA awarded FPS a grant in the amount of $281,176 and a no-interest loan in the amount of $319,630 for asbestos removal.

3. On May 15, 1989, SLPA entered into an agreement with FPS to design and oversee the asbestos abatement procedure to be followed by the contractor who would do the actual asbestos removal. On February 28, 1990, Brad's Asbestos Removal, Inc., (BAR) was awarded the contract for the asbestos removal work. BAR is owned by Russell Curtis, and the Nebraska BAR office is managed by Russell's brother Dean Curtis.

4. Funds are disbursed to a grant/loan recipient under ASHAA only after the recipient certifies to the EPA that costs have been incurred and work has been performed in accordance with the provisions of the program.

5. Between 1989 and 1991, Peters conspired with Dean and Russell Curtis to submit claims to the EPA for reimbursement under the ASHAA grant/loan for work that had not yet been undertaken, and for renovation work that did not involve asbestos removal and did not fall under the scope of ASHAA.

6. Peters prepared and submitted three false claims for reimbursement to the EPA on behalf of FPS, resulting in overpayment of ASHAA federal funds to FPS in the amount of $153,476.

7. On December 21, 1993, after a criminal jury trial in this court, Peters was convicted of 3 counts of criminal false claims in violation of 18 U.S.C. § 287 and one count of conspiracy to defraud the government in violation of 18 U.S.C. § 371 arising from false claims for payment of federal grant and loan funds from the EPA under ASHAA.

8. On June 28, 1994, Peters was sentenced to a term of 24 months imprisonment, and payment of restitution in the amount of $153,476. Peters appealed to the Eighth Circuit Court of Appeals which affirmed the conviction and sentence. *U.S. v. Peters*, 59 F.3d 732 (8th Cir. 1995).

9. The Federal Bureau of Investigation incurred expenses related to the detection and investigation of Peters' case in the amount of $50,343.21.

10. The Environmental Protection Agency, Office of Inspector General has incurred expenses related to the investigation and litigation of Peters' case in the amount of $41,699.09.

The government argued that since Peters was convicted by a jury regarding the same conduct as alleged in its suit, Peters was precluded from denying the factual allegations as raised in the petition. Peters alleged that

the suit filed by the government violated his right to be free from multiple punishments for the same conduct.

The Court held that there was no genuine issue of material fact and granted the government's motion for summary judgment. The Court rejected Peters' double jeopardy claim stating that "the damages and civil penalties the government is entitled to under the False Claims Act in the amount of $480,428.00 cannot be said to bear no rational relation to the remedial goal of making the government whole for its proven losses of $245,518.21."

The Eighth Circuit Court of Appeals found, in its opinion dated April 8, 1997, that Peters' double jeopardy argument was unavailing and his other arguments were meritless, thereby affirming the judgment of the District Court.

REASONS FOR GRANTING THE WRIT

Certiorari should be granted in the instant case because it presents similar yet different questions raised in the case of *United States v. Halper*, 490 U.S. 435, 109 S. Ct. 1892 (1989). The issue in Peters is similar to that in *Halper* as both involve an interpretation of the double jeopardy clause of the United States Constitution's Fifth Amendment. In *Halper*, this Court held that the defendant who has already been punished in a criminal prosecution may not be subjected to an additional civil sanction to the extent that the second sanction may not be fairly characterized as remedial, but only as a deterrent or retribution. 490 U.S. at 448-49, 109 S. Ct. at 1902.

The reason the instant case needs to be reviewed by this Court is to allow this Court to review how district and circuit courts are determining whether a sanction is remedial or punitive.

In *Halper*, the defendant had overbilled the government $585.00 by submitting 65 false claims. He was convicted in a criminal case and received a $5,000.00 fine. The Government then brought a civil action under the False Claims Act, seeking civil penalties of over $130,000.00 based on the Act's provision for a civil penalty of $2,000.00 per false claim submitted. This Court held that the fine was the second punishment for the same offense.

The landmark holding in *Halper* has been interpreted by Circuit Courts to say that district courts must do a quantitative analysis in False Claim Act cases to determine whether "the recovery is exponentially greater than the amount of the fraud" or whether "a sanction [is] overwhelmingly disproportionate to the damages he has caused." 490 U.S. 445, 449, 109 S. Ct. at 1900, 1902.

In *Halper*, the ratio of penalties to damages caused turned out to be 224:1, while the ratio in Peters is less than 1:1.

In *Peters*, the district court awarded the Government a judgment of $480,428.00 and determined the loss to be $245,518.21. The excess of damages awarded over the loss involved is therefore $234,909.79. While the ratio is high in *Halper*, the excess of damages to loss involved was $129,415.00. Peters believes that these numbers speak for themselves and that while his ratio does not appear to be

patently unconstitutional, he and Irwin Halper have traveled different roads to the same unjust result in allowing the Government to be awarded much more than they lost.

> The Court announced that the rule in *Halper* was one:
>
> "For the rare case . . . , where a fixed penalty provision subjects a **prolific but small-gauge offender** to a sanction overwhelmingly disproportionate to the damages he has caused." 490 U.S. at 449, 109 S. Ct. at 1902.

Peters is not a prolific but small-gauge offender. On the contrary, he is just the opposite. He is a small but prolific gauge offender because he filed a limited number of false claims with a substantial loss to the Government. While Peters is the complete reverse of *Halper* under the False Claims Act, they both traveled different roads to the same unjust result.

Circuit Courts have taken the "disproportionate" and "exponential" language of *Halper* quite literally in drawing their line in the sand between remedial and punitive sanctions. In the instant case, the Eighth Circuit stated:

> "We know certainly that the ratio in *Halper* of 224:1 is punitive, and we can infer from the court's language – *e.g.*, 'where the recovery is *exponentially* greater than the amount of the fraud,' *id.* at 445 (emphasis added) – That a ratio of 100:1 would constitute a punishment, and perhaps the same might be true of a ratio of 10:1. But here the relevant ratio is not only not high, it is less than 1:1. . . . The ratio of Mr. Peters' fixed penalty to the damages that he caused cannot possibly support a claim that he has been subjected to double jeopardy, and the

> fact that he was held liable for only 4 violations puts a substantial additional difficulty in the way of his argument's success." 110 F.3d at 618.

The Eighth Circuit Court of Appeals seemed to hang its hat on footnote 12 in the *Halper* opinion which states:

> "It hardly seems necessary to state that a suit under the act alleging 1 or 2 false claims would satisfy the rational relationship requirement. It is only when a sizeable number of false claims is present that, as a practical matter, the issue of double jeopardy may arise."

I doubt the Court envisioned a defendent of Peters' type when footnote 12 was drafted. The idea of a limited but substantial gauge offender taking more of a hit than Mr. Halper, was probably not envisioned. In the instant case, the fact that Peters has been ordered to pay almost a quarter of a million dollars over and above what the Government has lost, sounds a clear alarm that the double jeopardy clause of the constitution has been violated because he had previously been ordered to spend 24 months in prison for the same offense.

The different roads to the same unjust result must be addressed by this Court so that district and circuit courts in this nation do not continue to apply quantitative ratio analyses to cases of this type. While other courts produce ratios to show that civil penalties sought in subsequent proceedings bear irrational relation to the goal of compensating the Government for its loss, there is no rational relation in forcing someone in Peters' position to pay $234,000.00 over what the Government has lost.

CONCLUSION

For the reasons set forth above, a writ of certiorari should issue, to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit in this matter.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 96-2814

United States of America, Appellee, v. Stanley L. Peters, Appellant.	* * * * * * *	Appeal from the United States District Court for the District of Nebraska.

Submitted: February 12, 1997
Filed: April 8, 1997

Before RICHARD S. ARNOLD, Chief Judge, and HANSEN and MORRIS SHEPPARD ARNOLD, Circuit Judges.

MORRIS SHEPPARD ARNOLD, Circuit Judge.

Stanley L. Peters appeals from a summary judgment imposing liability on him for civil damages and penalties under the False Claims Act, 31 U.S.C. §§ 3729-3733 ("FCA"), on account of certain fraudulent acts for which he was previously indicted and convicted. Because we hold that this judgment does not constitute punishment under *United States v. Halper*, 490 U.S. 435 (1989), we find that Mr. Peters's double-jeopardy argument is unavailing.

We find his other arguments to be meritless and we therefore affirm the decision of the district court.[1]

I.

The alleged danger of having children exposed to asbestos in many older schools led the federal government to fund asbestos removal through the Asbestos School Hazard Abatement Act ("Asbestos Act"), 20 U.S.C. §§ 4011-4022, administered by the Environmental Protection Agency ("EPA"), which makes grants and no-interest loans available to qualifying school districts. Stanley L. Peters and Associates ("SLPA") was an architectural and engineering firm that, among other things, assisted school districts in securing funds for the removal of asbestos. In 1989, SLPA helped the Fairbury, Nebraska public schools acquire a grant for $281,176 and a no-interest loan for $319,630 from the EPA. SLPA subsequently contracted with the school district to design and oversee the asbestos job, and hired a subcontractor to do the actual work.

The Asbestos Act provided for the disbursement of money only upon a claim by the grantee certifying that the costs had been incurred and that the work had been performed in accordance with the provisions of the act. SLPA conspired with its subcontractor to submit three claims for tasks that had not been performed and for renovation that did not qualify for reimbursement, resulting in an overpayment by the EPA to the school district in

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[1] The Honorable Richard G. Kopf, United States District Judge for the District of Nebraska.

the amount of $153,476. Mr. Peters was sentenced to 24 months in prison and ordered to pay restitution in the amount of the overpayment for his part in the scheme.

The government then brought this civil action under the FCA and secured a judgment against Mr. Peters for $480,428, a sum made up of two components: $460,428, representing three times the $153,476 in damages suffered by the government; and $20,000 in fixed penalties of $5,000 for each violation of the FCA. The amount of this judgment was reduced by the amount of the restitution ordered as part of Mr. Peters's criminal sentence.

II.

The rule laid down in *Halper*, 490 U.S. at 442, controls on the question of whether Mr. Peters has made out a double-jeopardy defense: Mr. Peters must show that his is that "particular case [in which] a civil penalty authorized by the [False Claims] Act [is] so extreme and so divorced from the Government's damages and expenses as to constitute punishment." We must ask, in other words, whether Mr. Peters's sanction was "so disproportionate to the damages caused that it constitutes a second punishment." *Id.* at 450. For Mr. Peters to prevail, his civil penalty must be shown to bear "no rational relation to the goal of compensating the Government for its loss." *Id.* at 449.

We examine, first, the component of the challenged judgment represented by the sum equal to three times the amount of damages that the government suffered. The Court in *Halper* had before it a double-damages provision that was part of the FCA at the time *Halper* was decided

and found that provision to be a reasonable approximation of a remedial fine and therefore not susceptible to a double-jeopardy challenge. *Id.* at 446 ("the Government is entitled to rough remedial justice . . . such as . . . a fixed sum plus double damages"). We have held that the FCA's treble-damages provision, which went into effect in 1986, is likewise in the nature of rough remedial justice and therefore not punitive for double-jeopardy purposes. *United States v. Brekke*, 97 F.3d 1043, 1048 (8th Cir. 1996). Mr. Peters thus has no constitutional defense with regard to the $460,428 for which he was held liable under the treble-damages provision of the FCA.

It is therefore only the second component of the challenged judgment, the $20,000 in fixed penalties, which could possibly be subject to a double-jeopardy challenge. The Court in *Halper* had before it a defendant who filed sixty-five false claims, each for about twelve dollars. The FCA's fixed-penalty provision at the time *Halper* was decided called for a $2,000 fine for each false claim. The resulting liability was more than $130,000, hugely disproportionate to the total damages of $585. The Court did not question the validity of a fixed-penalty provision in principle, but found its application in the case before it to be punitive and thus unconstitutional, announcing "a rule for the rare case . . . where a fixed-penalty provision subjects a prolific but small-gauge offender to a sanction overwhelmingly disproportionate to the damages he has caused." *Halper*, 490 U.S. at 449. The Court emphasized the narrowness of its holding in a footnote declaring that "[i]t hardly seems necessary to state that a suit under the [False Claims] Act alleging one or two false claims would satisfy the rational-relationship requirement. It is only when a sizable number of false

claims is present that, as a practical matter, the issue of double jeopardy may arise." *Id.* at 451 n.12.

Under *Halper,* therefore, the most important question to be asked when considering whether a fixed-penalty provision might give rise to a double-jeopardy defense is how the total fixed penalties relate arithmetically to the total damages caused. We know certainly that the ratio in *Halper* of 224:1 is punitive, and we can infer from the Court's language – *e.g.*, "where the recovery is *exponentially* greater than the amount of the fraud," *id.* at 445 (emphasis added) – that a ratio of 100:1 would constitute a punishment, and perhaps the same might be true of a ratio of 10:1. But here, the relevant ratio is not only not high, it is less than 1:1. There is, moreover, the suggestion in *Halper* just alluded to that a fixed penalty on the order of a few thousand dollars cannot be punitive when the number of claims is relatively small. For our purposes, then, the result called for under *Halper* seems quite clear: The ratio of Mr. Peters's fixed penalty to the damages that he caused cannot possibly support a claim that he has been subjected to double jeopardy, and the fact that he was held liable for only four violations puts a substantial additional difficulty in the way of his argument's success.

III.

Finding no merit in any other issue presented by Mr. Peters, we affirm the judgment of the district court.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

UNITED STATES OF AMERICA,	)	4:CV 95-334
Plaintiff,	)	**MEMORANDUM AND ORDER**
vs.	)	(Filed Jun. 3, 1996)
STANLEY L. PETERS,	)	
Defendant.	)	

Pending before the court are the parties' cross-motions for summary judgment (filing 11, Defendant's motion; filing 15, Plaintiff's motion) and the evidence submitted in support of these motions.[1] For the reasons discussed below I will grant the plaintiff's motion for summary judgment and deny defendant's motion for summary judgment.

I. BACKGROUND

In December 1993, Stanley L. Peters (Peters) was convicted on three counts of submitting false claims to

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[1] As evidence in support of its motion for summary judgment the Plaintiff has submitted three declarations (filings 16, 17, 18) and asked the court to take judicial notice of all files and records in the case *United States v. Stanley L. Peters*, 4:CR93-3034, and *United States v. Peters*, 59 F.3d 732 (8th Cir. 1995). (Filing 15.)

As evidence in support of his motion for summary judgment the Defendant has submitted the affidavit of Stanley Peters (filing 12, Ex. A), and the judgment and commitment order entered by this court in *United States v. Stanley L. Peters*, 4:CR93-3034.

the Environmental Protection Agency, one count of conspiracy to defraud the United States, and one count of theft of government property. *United States v. Stanley L. Peters*, 4:CR93-3034, *aff'd*, *U.S. v. Peters*, 59 F.3d 732 (8th Cir. 1985). The United States has now brought this action against Peters to recover civil monetary penalties and damages pursuant to the False Claims Act (FCA), 31 U.S.C. §3729 et seq.

Defendant's motion for summary judgment (filing 11) alleges that based on Peters's [sic] prior criminal conviction the doctrine of res judicata or collateral estoppel bars this claim or bars relitigation of certain issues. Peters also asserts that the this [sic] civil penalty constitutes punishment for double jeopardy purposes and thus violates the Fifth Amendment. Plaintiff's motion for summary judgment (filing 15), alleges that defendant's prior criminal conviction collaterally estops the defendant from relitigating the issue liability, and as a matter of law the plaintiff is entitled to treble damages in the amount of $460,428 and $40,000 in civil penalties pursuant to § 3729(a).

II. UNDISPUTED MATERIAL FACTS

After considering the parties' evidence and briefs in support of their motions for summary judgment, I find the undisputed material facts to be as follows.

1. Peters owned the architectural/engineering firm of Stanley L. Peters and Associates (SLPA). SLPA was in the business of assisting school districts in applying for federal grants for the removal of asbestos under the

Asbestos School Hazard Abatement Act (ASHAA), 20 U.S.C. §§ 4011 et seq.

2. SLPA assisted the Fairbury Public Schools (FPS) in applying to the United States Equal Protection Agency for financial assistance under the ASHAA, and on April 28, 1989 the EPA awarded FPS a grant in the amount of $281,176 and a no-interest loan in the amount of $319,630 for asbestos removal.

3. On May 15, 1989, SLPA entered into an agreement with FPS to design and oversee the asbestos abatement procedure to be followed by the contractor who would do the actual asbestos removal. On February 28, 1990, Brad's Asbestos Removal, Inc., (BAR) was awarded the contract for the asbestos removal work. BAR is owned by Russell Curtis, and the Nebraska BAR office is managed by Russell's brother Dean Curtis.

4. Funds are disbursed to a grant/loan recipient under ASHAA only after the recipient certifies to the EPA that costs have been incurred and work has been performed in accordance with the provisions of the program.

5. Between 1989 and 1991, Peters conspired with Dean and Russell Curtis to submit claims to the EPA for reimbursement under the ASHAA grant/loan for work that had not yet been undertaken, and for renovation work that did not involve asbestos removal and did not fall under the scope of ASHAA.

6. Peters prepared and submitted three false claims for reimbursement to the EPA on behalf of FPS, resulting in overpayment of ASHAA federal funds to FPS in the amount of $153,476.

7. On December 21, 1993, after a criminal jury trial in this court, Peters was convicted of 3 counts of criminal false claims in violation of 18 U.S.C. § 287 and one count of conspiracy to defraud the government in violation of 18 U.S.C. § 371[2] arising from false claims for payment of federal grant and loan funds from the EPA under ASHAA.

8. On June 28, 1994, Peters was sentenced to a term of 24 months imprisonment, and payment of restitution in the amount of $153,476. Peters appealed to the Eighth Circuit Court of Appeals which affirmed the conviction and sentence. *U.S. v. Peters*, 59 F.3d 732 (8th Cir. 1995).

9. The Federal Bureau of Investigation incurred expenses related to the detection and investigation of Peters's [sic] case in the amount of $50,343.21.

10. The Environmental Protection Agency, Office of Inspector General has incurred expenses related to the investigation and litigation of Peters's [sic] case in the amount of $41,699.09.

III. DISCUSSION

A. Summary Judgment Standard

Summary judgment should be granted only "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a

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[2] Peters was also convicted on one count of theft of government property in violation of 18 U.S.C. § 641.

matter of law." Fed. R. Civ. P. 56(c). *See Also Egan v. Wells Fargo Alarm Servs.*, 23 F.3d 1444, 1446 (8th Cir.), *cert. denied*, 115 S. Ct. 319 (1994). In passing upon a motion for summary judgment, the district court must view the facts in the light most favorable to the party opposing the motion. *Vette Co. v. Aetna Casualty & Surety Co.*, 612 F.2d 1076, 1077 (8th Cir. 1980). *See also Reierson v. Resolution Trust Corp.*, 16 F.3d 889, 891 (8th Cir. 1994).

In order to withstand a motion for summary judgment, the nonmoving party must substantiate their allegations with " 'sufficient probative evidence [that] would permit a finding in [their] favor on more than mere speculation, conjecture, or fantasy.' " *Moody v. St. Charles County*, 23 F.3d 1410, 1412 (8th Cir. 1994) (quoting *Gregory v. Rogers*, 974 F.2d 1006, 1010 (8th Cir. 1992), *cert. denied*, 113 S.Ct. 1265 (1993)). "A mere scintilla of evidence is insufficient to avoid summary judgment." *Id.* Essentially the test is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251-52 (1986).

> [T]he plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. In such a situation, there can be "no genuine issue as to any material fact," since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts

> immaterial. The moving party is "entitled to a judgment as a matter of law" because the non-moving party has failed to make a sufficient showing on an essential element of her case with respect to which she has the burden of proof.

Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986).

B. Collateral Estoppel on the Issue of Liability

The United States moves for summary judgment on the ground that the judgment in Peters's [sic] criminal case collaterally estops Peters from contesting the issue of liability in the instant case. I agree.

Under the doctrine of collateral estoppel, a party may not relitigate an issue that has been decided on the merits in an earlier proceeding. *SEC v. Gruenberg*, 989 F.2d 977, 978 (8th Cir. 1993). "[T]he judgment in the prior proceeding precludes the relitigation of issues actually litigated and necessary to the outcome of the first action." *Parklane Hosiery Co., Inc. v. Shore*, 439 U.S. 322, 326 n. 5 (1979). It is well established that "a prior criminal conviction may work an estoppel in favor of the Government in a subsequent civil proceeding . . . [provided the questions were] 'distinctly put in issue and directly determined' in the criminal prosecution. *Emich Motors Corp. v. General Motors Corp.*, 340 U.S. 558, 568-69 (1951); *Gruenberg*, 989 F.2d at 978.

The identical factual conduct and violation of law raised in this civil action were distinctly put in issue and directly determined against Peters in his criminal trial. The False Claims Act provides for liability against:

> Any person who –
>
> (1) knowingly presents, or causes to presented, to an officer or employee of the United States Government or a member of the Armed Forces of the United States a false or fraudulent claim for payment or approval;
>
> (2) knowingly makes, uses, or causes to be made or used, a false record or statement to get a false or fraudulent claim paid or approved by the Government;
>
> (3) conspires to defraud the Government by getting a false or fraudulent claim allowed or paid.

31 U.S.C. § 3729(a).

Peters' [sic] criminal convictions for filing false claims to the EPA and for conspiring to file false claims to the EPA clearly establish violations under the False Claims Act. The complaint in this False Claims action is based on the same allegations that served as the basis for the criminal convictions. Indeed, the verdict form used by the jury in the criminal case conclusively establishes that the issues of whether Peters submitted false claims to the government and whether Peters conspired to submit false claims to the government were distinctly put in issue and directly determined in the criminal proceeding.[3]

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[3] As to Count I the jury concluded, "We find the defendant Stanley L. Peters guilty of conspiracy to defraud the United States." As to each of Counts II, III, and IV, the jury concluded, "We find the defendant Stanley L. Peters guilty of making a false and fraudulent claim against the United States. . . ." *United States v. Stanley L. Peters*, 4:CR93-3034 (filing 38), *aff'd United States v. Peters*, 59 F.3d 732 (8th Cir. 1995).

Moreover, section 3731(d) of the False Claims Act instructs courts to give conclusive collateral estoppel effect to criminal convictions in any civil action, such as the present case, which arises under the Act:

> Notwithstanding any other provision of law, the Federal Rules of Criminal Procedure, or the Federal Rules of Evidence, a final judgment rendered in favor of the United States in any criminal proceeding charging fraud or false statements, whether upon a verdict after trial or upon a plea of guilty or nolo contendere, shall estop the defendant from denying the essential elements of the offense in any action which involves the same transaction as in the criminal proceeding and which is brought under subsection (a) or (b) of section 3730.

Case law fully supports the application of collateral estoppel to criminal convictions on the issue of liability in subsequent civil proceedings predicates on the False Claims Act. *See, e.g., United States v. O'Connell,* 890 F.2d 563 (1st Cir. 1989); *United States v. Thomas,* 709 F.2d 968 (5th Cir. 1983); *Berdick v. United States,* 612 F.2d 533 (Ct. Cl. 1979); *Sell v. United States,* 336 F.2d 467 (10th Cir. 1964).

Peters has also moved for summary judgment on collateral estoppel grounds, stating, "[t]he United States may not now retry the issues of guilt and damages which were fundamental and material to the Court's prior decision." (Def.'s Br. Mot. Summ. J. at 7.) To the extent that Peters seeks collateral estoppel on the issue of liability based on the prior criminal conviction, it shall be granted for the same reasons plaintiff's motion on this issue is granted.

Although Peters characterized his argument as one asserting collateral estoppel, he may have intended to assert the doctrine of res judicata. In his brief Peters states, "[t]he [criminal proceeding] should be given *collateral estoppel* effect to prohibit a subsequent *claim* based on the same issues." (Def.'s Br. Mot. Summ. J. at 8. (second emphasis added).)

> Under the doctrine of res judicata, a judgment on the merits in a prior suit bars a second suit involving the same parties or their privies based on the same cause of action. Under the doctrine of collateral estoppel, on the other hand, the second action is upon a different cause of action and the judgment in the prior suit precludes relitigation of issues actually litigated and necessary to the outcome of the first action.

Parklane Hosiery Co., Inc. v. Shore, 439 U.S. 322, 326 n. 5 (1979).

To the extent Peters is seeking summary judgment based on the doctrine of res judicata, it shall be denied. Peters has cited no case authority to support the application of res judicata, nor can this court find any such authority. *See United States v. Barnette*, 10 F.3d 1553, 1561 (11th Cir. 1994) ("We decline to misapply the doctrine of res judicata in such a fashion.")

Peters's case falls squarely within the direction of section 3731(d), and the common law doctrine of collateral estoppel. Therefore, I will grant plaintiff's motion for summary judgment on the issue of liability. I will grant Peters's motion for summary judgment on the issue of liability to the extent it is based on collateral estoppel,

and deny his summary judgment motion to the extent it asserts the doctrine of res judicata bars this claim.

C. Damages

The False Claims Act provides that once liability is established, the defendant is liable to the United States Government for trebel actual damages and liable for a civil penalty of "not less than $5,000 and not more that [sic] $10,000" for each violation. 31 U.S.C. § 3729(a).

1. Trebel Actual Damages

The measure of actual damages is determined by the amount paid due to the false claim minus the amount paid had the claim been truthful. *United States v. Cooperative Grain and Supply Co.*, 476 F.2d 47, 63 (8th Cir. 1973). The government contends, as does Peters, that the amount of actual damages the government sustained due to the Peters's false claims is $153,476. In fact, Peters argues the government is collaterally estopped from relitigating the amount of actual damages it sustained. Peters asserts:

> [T]he United States has already been given a full and fair opportunity to present evidence of . . . losses sustained by the United States. . . . At both the trial and the sentencing the United States presented evidence of the losses it sustained. The court found the [sic] that the losses totaled 153,476.00. (Sentencing Transcript pp. 13-16). Granting a full recovery for its loss, the Court ordered restitution to be paid to the

> United States in the amount of $153,476.00. (Exhibit "B", Page 3, Paragraph 12).

(Def.'s Br. Mot. Summ. J. at 7).

Peters appealed his criminal conviction and sentence to the Eighth Circuit Court of Appeals. *United States v. Peters,* 59 F.3d 732 (8th Cir. 1995). At that time Peters argued this court erred in calculating the amount of loss sustained by the Government. The Court of Appeals rejected Peters's argument and concluded the calculation was not erroneous. *Id.* at 734.

Peters has submitted no evidence in opposition to the Government's motion for summary judgment that the amount of restitution ordered at the criminal proceeding was incorrect. The facts established by the Government are undisputed, and in fact are corroborated by Peters, that actual damages in this case amount to $153,476.

The Government is allowed to recover the actual damages it has suffered due to the false claims, "plus the statutory penalties." *Cooperative Grain,* 476 F.2d at 63. The treble damages and penalties allowed under the False Claims Act "are further sanctions that aid in making the Government 'whole'." *Id.* Finding no dispute between the parties that the actual loss sustained by the Government was $153,476, section 3729(a) requires the imposition of treble damages. Therefore, Peters is liable to the Government for $460,428 under the trebling provision of the False Claims Act.

2. Civil Penalty

In addition, Peters is liable for a civil penalty of "not less than $5,000 and not more than $10,000" for each violation. It is undisputed that Peters has committed four violations of the False Claims Act, thus the total amount in civil penalties to be imposed must be within the range of $20,000 to $40,000.

The Government has submitted three Declarations in support of its position that the maximum penalty is warranted in this case. The declarations, which are undisputed by Peters, establish that the FBI and EPA incurred investigative costs in this case of $92,042.21. (Filings 16, 17, 18.)

The primary purpose of the False Claims Act and its civil penalties is to make the government whole for such costs as detection, investigation, and prosecution of those who defraud the United States. *United States v. Halper,* 490 U.S. 435 (1988). Peters contends that the government was made whole by virtue of the restitution order in the criminal proceeding. However, the calculation of restitution did not account for the costs of detection, investigation, and prosecution of these two cases which the Government is now attempting to recoup. *See eg United States v. Barnette,* 10 F.3d 1553 (11th Cir. 1994) (criminal order of restitution does not affect availability of subsequent civil claim brought under False Claims Act or imposition of civil penalties); *United States v. Boutte,* 907 F.Supp. 239 (E.D.Tex. 1995); *United States v. Fliegler,* 756 F.Supp. 688 (E.D.N.Y. 1990).

It is unclear just how exacting the government's proof must be in order to be entitled to the maximum penalty. *Boutte*, 907 F.Supp. at 243. Although *Halper* seems to suggest that the Government need not present evidence of each dollar spent in investigating and prosecuting false claims in order to fully recover under the False Claims Act, that case applied the False Claims Act as it appeared prior to 1986 amendments to the Act. Prior to 1986 the civil penalty for each violation was a mandatory $2,000 per violation. The 1986 amendments created a range of between $5,000 and $10,000 for each violation which "apparently represents congressional intent to allow discretion in assessing forfeitures." *United States v. Hill*, 676 F.Supp. 1158, 1182 (N.D.Fla. 1987).

The parties agree that the actual damage incurred as a result of Peters's false claims were $153,476, and the government has submitted proof of an additional $92,042.21 in costs incurred as a result of Peters's false claims. It is undisputed therefore that the government is out $245,518.21. The government has been awarded treble actual damages of $460,428. The difference between the costs the government has proven it has incurred ($245,518.21) and the amount the government will receive under the trebling provision ($460,428) is $224,909.79.

Actual Damages		$153,476.00
Investigative Expenses	+	$ 92,042.21
Proven Government Loss		$245,518.21
Treble Damages		$460,428.00
Government Loss	-	$245,518.21
		$224,909.79

In its brief the government notes that it has not submitted evidence of prosecutive expenses but states

"[w]e are aware of no precedent requiring proof of investigative or prosecutive costs to substantiate appropriate awards in false claims cases." (Pl.'s Br. Mot. Summ. J. at 17 n.9.) However, I cannot find that as a matter of law the government is entitled to the maximum penalty of $40,000 when it will already receive over $200,000 in excess of what it has proven to have lost. Therefore, Peters's four civil penalties will be assessed at $5,000 each for a total civil penalty of $20,000.

D. Double Jeopardy

Relying on *United States v. Halper,* 490 U.S. 435 (1989), Peters argues that the Double Jeopardy Clause of the Fifth Amendment bars the implication of treble damages and civil penalties against him. I reject this argument and will deny Peters's motion for summary judgment on this ground. The Double Jeopardy Clause protects against three abuses: a second prosecution for the same offense after an acquittal; a second prosecution for the same offense after conviction; and multiple punishments for the same offense. *North Carolina v. Pearce,* 395 U.S. 711, 717 (1969). In this case Peters asserts he is subject to multiple punishments for the same offense.

Halper held that "a defendant who already has been punished in a criminal prosecution may not be subjected to an additional civil sanction *to the extent that the second sanction may not fairly be characterized as remedial,* but only as a deterrent or retribution." 490 U.S. at 448-49 (emphasis added). In *Halper,* the defendant was convicted of making 65 false claims resulting in actual damages to the government in the amount of $585 plus an estimated

$16,000 for investigating and prosecuting the action. Under the FCA's mandatory penalty provision, Halper was liable for 65 penalties at $2,000 each, or a total of $130,000.

Recognizing the primary purpose of the False Claims Act is to make the government whole, the Supreme Court concluded that a civil penalty of $130,000 bore no rational relation to the government's actual loss and thus was considered punishment for purposes of double jeopardy. However, the Court cautioned:

> What we announce now is a rule for the rare case, the case such as the one before us, where a fixed-penalty provision subjects the prolific but small-gauge offender to a sanction overwhelmingly disproportionate to the damages he has caused.

Id. at 449.

Peters is neither a "prolific" or "small gauge" offender. In stark contrast to the 65 false claims submitted by Halper resulting in an actual loss of $565 to the Government, in the present case there have been four violations resulting in an actual loss of $153,476. In further defining the limited application of *Halper,* the Supreme Court went on to note that a suit under the false Claims Act "alleging one or two false claims would satisfy the rational-relationship requirement. It is only when a sizable number of false claims is present that, as a practical matter, the issue of double jeopardy may arise." *Id.* at 451, n.12.

Peters argues that since "restitution has been fully ordered [in the criminal case] for the losses to the United

States" this case may be viewed only as serving a punitive rather than remedial purpose. (Def.'s Br. Mot. Summ. J. at 13-14.) However, Peters ignores the fact that the restitution order considered only actual damages sustained by the Government because of the false claims he filed, and does not take into account further expenses incurred by the Government related to the detection, investigation, and prosecution of the false claims.

In light of the imposition of the minimum civil penalty of $5,000 per violation, the fact that there are only four violations, and the relatively large amount of actual damages ($153,476 as compared to $565 in Halper) I find there is no basis upon which to conclude the double jeopardy clause is implicated in this case. The damages and civil penalties the government is entitled to under the False Claims Act in the amount of $480,428 cannot be said to bear no rational relation to the remedial goal of making the government whole for its proven losses of $245,518.21. *See eg United States v. Boutte,* 907 F.Supp. at 243 (total award of $1,019,881 bears rational relation to loss of $301,627).

IV. CONCLUSION

As discussed above, there are no genuine issues of material fact to be tried, and Plaintiff is entitled to judgment as a matter of law against Defendant in the amount of $480,428.00. This award shall be reduced by the amount, if any, Defendant has already paid in satisfaction of the prior criminal restitution order entered by this court on June 28, 1994.

Accordingly,

IT IS ORDERED that:

1. Plaintiff's motion for summary judgment (filing 15) is granted, consistent with this memorandum.

2. Defendant's motion for summary judgment (filing 11) is denied.

DATED this 3rd day of June, 1996.

BY THE COURT:

/s/ Richard G. Kopf
Richard G. Kopf
United States
District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

UNITED STATES OF AMERICA,	)	
Plaintiff,	)	4:CV 95-3347
vs.	)	**JUDGMENT**
STANLEY L. PETERS,	)	(Filed June 3, 1996)
Defendant.	)	

Pursuant to the court's Memorandum and Order previously filed in this matter, final judgment is entered in favor of the plaintiff and against the defendant, providing that plaintiff is awarded against defendant $480,428.00 plus interest on this amount to begin accruing as of today's date at the legal rate of 5.62%.

DATED this 3rd day of June, 1996.

BY THE COURT:

/s/ Richard G. Kopf
Richard G. Kopf
United States
District Judge